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THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES

The right to a fair trial: Current recognition and measures necessary for its strengthening

Third report prepared by Mr. Stanislav Chernichenko
and Mr. William Treat

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Introduction

1. In resolution 1989/27, the Sub-Commission on Prevention of Discrimination and Protection of Minorities decided to appoint two of its members to prepare a report on existing international standards pertaining to the right to a fair trial. The Sub-Commission also requested that the two members recommend "which provisions guaranteeing the right to a fair trial should be made non-derogable".

2. On 7 March 1990, the Commission on Human Rights, in its decision 1990/108, welcomed the Sub-Commission's decision to appoint Mr. Stanislav Chernichenko and Mr. William Treat to prepare a report on the right to a fair trial and requested the Sub-Commission to consider that report at its forty-second session, directly under the agenda item 10 (d) entitled "Administration of justice and the human rights of detainees: the right to a fair trial".

3. The two members of the Sub-Commission prepared a first brief report (E/CN.4/Sub.2/1990/34) to provide an overview of the subject and to indicate the areas which needed further study. The brief report also made some general observations and set forth the principal treaties and other international human rights standards which were the most protective of each attribute of a fair trial. Further, the first brief report discussed considerations relevant to making non-derogable at least some aspects of the right to a fair trial. In addition, the brief report recommended that a more comprehensive study should be undertaken on the right to a fair trial and how that right might be strengthened.

4. In resolution 1990/18, the Sub-Commission recommended that the Commission and the Economic and Social Council endorse the decision to entrust Mr. Chernichenko and Mr. Treat, as Special Rapporteurs, with the preparation of a study entitled "The right to a fair trial: current recognition and measures necessary for its strengthening".

5. The Commission on Human Rights, in resolution 1991/43, and the Economic and Social Council in resolution 1991/28, endorsed Sub-Commission resolution 1990/18 and requested the Special Rapporteurs to draft a questionnaire on the right to a fair trial.

6. The two Special Rapporteurs prepared a second report (E/CN.4/Sub.2/1991/29) principally containing a summary of the interpretations of the right to a fair trial by the Human Rights Committee and also including a revised questionnaire relating to national practices in regard to the right to a fair trial.

7. The Sub-Commission in resolution 1991/14, the Commission in resolution 1992/34 and the Economic and Social Council in resolution 1992/..., asked the two Special Rapporteurs to continue their study on the right to a fair trial. It was anticipated that their third report in 1992 would focus on the interpretations of international organizations in the Americas and Europe of the right to a fair trial, and that their fourth report in 1993 would focus on national practices in regard to the right, based in particular on responses to the questionnaire, and that their fifth report in 1994 would contain recommendations for strengthening the implementation of the right.

8. Section I of the present (third) report summarizes the discussion of the second report and indicates several revisions which will appear in the final report. Section II identifies additional expressions of international fair trial norms that have been identified since the second report of July 1991. Section III provides a very preliminary analysis of the responses received thus far to the questionnaire. Section IV suggests further work which needs to be accomplished in order to prepare a more comprehensive report on the right to a fair trial and recommends ways to strengthen that right. Section V contains a supplemental bibliography of relevant material identified since the second report. Addendum 1 to the report summarizes the interpretations of fair trial standards by the European Commission and Court of Human Rights. Addendum 2 summarizes the interpretations of fair trial standards by the Inter-American Commission on and Court of Human Rights. Addendum 3 summarizes information on amparo, habeas corpus and similar proecedures; Addendum 3 also contains the notes for the entire third report.

I. COMMENTS ON AND REVISIONS TO THE FIRST TWO REPORTS

9. The first brief report (E/CN.4/Sub.2/1990/34) looked at the treaties and other instruments defining the attributes of the right to a fair trial which are the most protective of the right. The second report briefly noted the discussion of the first report and made several revisions to the text which will appear in the final report; identified new sources of international fair trial norms; summarized the interpretations of fair trial standards by the Human Rights Committee under the International Covenant on Civil and Political Rights; and contained a revised version of the preliminary questionnaire on national practices in regard to the right to a fair trial.

10. Several members of the Sub-Commission congratulated the Special Rapporteurs on their report and particularly praised the summary of the Human Rights Committee's interpretations of the right to a fair trial. One alternate member of the Sub-Commission drew attention to the interesting and useful analysis of the interpretations of the Human Rights Committee relating to the right to a fair trial. He also raised questions as to whether Governments would devote sufficient time and resources to responding to the detailed questionnaire. Recognizing the enormous breadth of the study, he suggested that the Special Rapporteurs begin their work with the fair trial rights of persons who are detained and then widen their study to include administrative and civil proceedings not involving detainees. In addition, he suggested that the Special Rapporteurs eventually consider preparing model legislation in regard to the right to a fair trial and a list of fair trial rights which should not be the subject of derogation, with a view to preparing a new protocol to the International Covenant on Civil and Political Rights. He expressed the view that amparo and habeas corpus were fundamental to the right to a fair trial.

11. During the forty-second and forty-third sessions of the Sub-Commission, members suggested that certain aspects of the right to a fair trial, for example, the right to petition for habeas corpus or amparo, should be made non-derogable even during periods of emergency. In that regard, the Commission, in its resolution 1992/35, called on all States "to establish a procedure such as habeas corpus by which anyone who is deprived of his or her

liberty by arrest or detention shall be entitled to institute proceedings before a court, in order that that court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is found to be unlawful" and "to maintain the right to such a procedure at all times and under all circumstances, including during states of emergency".

12. Two other members of the Sub-Commission supported the possibility of eventually preparing a model code or declaration. One of those members also stated that the fair trial report should include material on the right to habeas corpus.

13. A member suggested that the Special Rapporteurs consider more fully the application of fair trial standards during states of emergency and referred to the report of Mr. Despouy (E/CN.4/Sub.2/1991/28) in that regard. Another member drew attention to the use of military courts against civilians who commit offences in areas under military control or against military property. He believed that such cases should also be afforded the right to a fair trial.

14. Another member supported the methodology of the proposed study and hoped that it would help develop international standards, such as normative guidelines. He thought the standards should embody a normative expression of neutral issues to assist countries struggling to improve their judicial process. The member also warned of the use of military courts to try civilians. He noted that although the Covenant did not prohibit military courts from trying civilians, a military court might impinge upon a civilian's rights. He stressed that the mere handling of military secrets should not bring a person within the jurisdiction of military courts. The member also encouraged the Special Rapporteurs to pay special attention to the right to counsel and, in particular, to how quickly legal counsel might consult with a detainee after arrest. In addition, the member urged States to strengthen the adversarial elements of their justice systems. He said that article 14 of the Covenant supported the use of the adversarial elements, recognizing in particular the right to give evidence. The member, noting his own recent experience in drafting a constitution for Slovenia, expressed the hope that Eastern European countries would strengthen the adversarial components of their justice systems, and that the study would provide the necessary guidance.

15. One member of the Sub-Commission noted a number of problems with the Spanish translation of the second report, suggested that more attention should be given to the separation of minors from adults in detention, referred approvingly to paragraphs 35 to 37 of the second report which dealt with restrictions on prison visits and correspondence, said that prohibiting arbitrary restrictions was very important, and recommended that the right to correspondence and to visit detainees should not be limited to their families and that foreigners who were detained should be entitled to consular visits. He also suggested that the Special Rapporteurs should focus on the right to an automatic appeal for prisoners who face the death penalty as well as the practical application of the internationally accepted norm under which the death penalty was not applied to juvenile offenders and to pregnant women. He also hoped that the questionnaire would be revised to focus on several of those issues. To the extent that those suggestions are focused on national

practices, they will be taken into account in the fourth report to be presented to the Sub-Commission at its forty-fifth session. As to the application of international human rights norms concerning detained juveniles, Ms. M.C. Bautista has prepared a report (E/CN.4/Sub.2/1991/24) for the Sub-Commission. The issues were to some extent covered in the revised questionnaire and the Sub-Commission decided to recommend the dissemination of the revised questionnaire annexed to the second report.

16. A non-governmental organization submitted a written intervention (E/CN.4/Sub.2/1991/NGO/28) suggesting that the two Special Rapporteurs should also consider fair trial and other procedures in administrative adjudication which may deal with refugees, administrative dentention, rights of employees and similar matters.

17. During the Sub-Commission's discussion of the second report, several members and representatives of non-governmental organizations presented information about practices in particular countries relating to the right to a fair trial, as well as on the related issue of the independence of the judiciary and practising lawyers. Among the countries discussed were the People's Republic of China (including information on Tibet), Colombia, Guatemala, India, Indonesia (focusing particularly on East Timor), the Islamic Republic of Iran, Japan, Kenya, Kuwait, Myanmar, Nepal, Papua New Guinea, the Philippines, the Republic of Korea, Turkey, and the United States of America. The observers for Colombia, Indonesia, Japan, Kenya, Myanmar, the Republic of Korea, and Turkey provided further information or otherwise replied on these issues. The two Special Rapporteurs expect to utilize information about national practices in their fourth report to the forty-fifth session of the Sub-Commission in 1993.

18. The two Special Rapporteurs welcome the substantive comments and suggestions made by members and alternates of the Sub-Commission as well as by representatives of Governments and non-governmental organizations. The comments and suggestions were reflected in the resolution adopted by the Sub-Commission or will be reflected in the present and in later reports. The comments also reflect the need for coordination in regard to recommendations arising from the studies on the right to a fair trial, states of emergency, and the independence of the judiciary and the protection of practising lawyers.

II. ADDITIONAL EXPRESSIONS OF FAIR TRIAL NORMS AND TRENDS IN THEIR DEVELOPMENT

19. In August 1991, Mr. L. Joinet presented his first report (E/CN.4/Sub.2/1991/30 and Add.1-4) to the Sub-Commission on strengthening the independence of the judiciary and the protection of practising lawyers. That report focused principally on advisory services and national practices; the material on national practices will be taken into account in the fourth report on the right to a fair trial expected for 1993.

20. In August 1991, Mr. J. Carey presented a brief working paper on habeas corpus to the Working Group on Detention. The Working Group's report (E/CN.4/Sub.2/1991/27, para. 32) reflected that Mr. Carey and Mr. J.C. Hitters were invited to prepare an in-depth working paper on

habeas corpus and amparo, with a view to assisting Mr. Chernichenko and Mr. Treat in the preparation of their report on the right to a fair trial. During the Sub-Commission's discussion of this issue, it was understood that any material received from Mr. Carey and Mr. Hitters would be incorporated in future reports on the right to a fair trial. The issue of habeas corpus and amparo would remain on the agenda of the Working Group. No working paper had been received as of the time the present report was prepared. The Special Rapporteurs would be pleased to incorporate any working paper into future reports; in the meantime, annex III to the present report discusses habeas corpus and amparo.

21. The attention of the Special Rapporteurs has recently been drawn to a very useful document entitled "Executive Action and the Rule of Law" prepared by the International Commission of Jurists as a result of a conference in Brazil in 1962. The document sets forth fundamental principles for a fair trial in administrative cases, including the requirement of adequate notice to interested parties; adequate opportunity for them to prepare the case, including access to relevant data; their right to be represented by counsel or other qualified person; adequate notice of the decision and the reasons; and their right to recourse to a higher administrative authority or court. The document indicates that it would be advisable for administrators to promulgate regulations after having secured expert advice, consult organizations or interested groups, and give an opportunity to interested individuals to present their views.

22. On 5 August 1990, the 19th Islamic Conference of Foreign Ministers in Cairo adopted the Cairo Declaration on Human Rights in Islam. Article 19 of the declaration provides for equality of all individuals before the law, the right to a judicial remedy for each person, individual penal responsibility, no penalties except as prescribed by Shariah, the presumption of innocence, and an honest trial in which the rights of defence are fully guaranteed. Article 20 forbids arrests, restraints on liberty, exile or punishment without legitimate reasons. Article 21 forbids the taking of hostages. Article 24 states that all the rights in the declaration are subordinate to the principles of Shariah.

23. On 2 December 1990, a group of scholars convened by the Institute for Human Rights, Abo Akademi University, in Turku/Abo, Finland, adopted a Declaration of Minimum Humanitarian Standards (see E/CN.4/Sub.2/1991/55), which are applicable in all situations, including internal violence, disturbances, tensions and public emergency, and which cannot be derogated from under any circumstances. Article 9 of that declaration delineates "judicial guarantees which are recognized as indispensable by the community of nations" in criminal cases, including the right to be informed without delay of charges, trial within a reasonable time in the presence of the accused, all necessary rights and means of defence, individual penal responsibility, the presumption of innocence, no compulsory self-incrimination, no double jeopardy and no criminal responsibility in the absence of a law defining the offence applicable at the time it was committed. Article 11 affords "judicial guarantees" in regard to the imposition of security measures of assigned residence, internment or administrative detention for security reasons.

Article 4 guarantees "the right to an effective remedy, including habeas corpus, ... as a means to determine the whereabouts or the state of health of persons deprived of their liberty and for identifying the authority ordering or carrying out the deprivation of liberty."

24. From 20 September to 4 October 1991, the 38 participating States of the Confernce on Security and Cooperation in Europe (CSCE) met in Moscow. The Concluding Document of the Moscow meeting stated that the participating States "will respect the internationally recognized standards that relate to the independence of judges and legal practitioners ... which, inter alia, provide for (i) prohibiting improper influence on judges ... [and] (v) guaranteeing tenure and appropriate conditions of service ...." The participating States also agreed, "A state of public emergency may not be used to subvert the democratic constitutional order, nor aim at the destruction of internationally recognized human rights and fundamental freedoms." In addition, the Concluding Document contains several significant protections for persons deprived of their liberty. Furthermore, the participating States agreed to recognize non-governmental organizations, to facilitate their visits to countries to observe human dimension conditions and to welcome their activities observing compliance with CSCE commitments.

25. Representatives of non-governmental organizations met in Tunis from 29 November to 2 December 1991 for the Arab-African Seminar on Criminal Justice and Penal Reform, held under the auspices of the Centre for Human Rights, the Tunisian League for Human Rights, Penal Reform International and the Arab Institute of Human Rights. The Seminar recommended that no person should be subjected to detention garde à vue for more than 24 hours; that any person placed in detention should immediately be permitted to contact his/her family and doctor; that interrogations should take place in the presence of a lawyer who may consult his/her client in private; that detention garde à vue should be permitted only in locations prescribed by law; that persons under detention garde à vue should not be subjected to pressure to incriminate themselves; that no one should be subjected to torture, arbitrary arrest or preventive detention for his/her beliefs or religious convictions; that provisional detention should not be imposed as a sanction; and that public authorities should not make contact with persons in provisional detention prior to their appearance in court. The Seminar made a number of other recommendations in regard to the independence of the judiciary, the rights of the defence, penal reform and other related issues.

26. At its eleventh session, in March 1992, the African Commission on Human and Peoples' Rights was to begin a study of fair trial issues. The Special Rapporteurs look forward to receiving any results of that study.

III. SUMMARY OF INITIAL RESPONSES TO QUESTIONNAIRE

27. The two Special Rapporteurs prepared an initial questionnaire for Governments and that questionnaire was transmitted to Member States, specialized agencies, and non-governmental organizations in mid-April by the Centre for Human Rights with a request for responses and comments, if possible by 31 May 1991. It was recognized by the Special Rapporteurs that the questionnaire requested detailed information and responses could not be prepared either quickly or easily.

28. The questionnaire recognized that such inquiries were time consuming for respondent Governments. Accordingly, the questionnaire contained two parts. In the first part Governments were principally asked to send copies of the relevant codes, rules, regulations, and decisions setting forth procedures in civil courts, criminal courts, emergency/special courts, military courts, and certain administrative processes.

29. If Governments were able to provide more substantive responses, they were requested to consider the questions raised in part II. Here again, it was recognized that answering the questions might be time consuming. Accordingly, Governments were asked to answer only those questions beginning with Arabic numbers and which were in bold print. If Governments were able to provide more complete responses, they could answer the questions beginning with small letters and which asked for more detailed information.

30. The two Special Rapporteurs received comments and suggestions on its questionnaire and the Sub-Commission requested that a revised questionnaire be sent once again to Member States. Furthermore, since the Commission had requested, in its decision 1991/43, that questionnaires be sent to interested specialized agencies and non-governmental organizations, the Sub-Commission requested that a slightly modified questionnaire be distributed to them since those bodies had concerns and information relating to more than one country. The Sub-Commission also requested that the questionnaire be sent to associations of lawyers which possessed information on the right to a fair trial.

31. On 22 November 1991, the revised questionnaire was sent to Governments, specialized agencies and non-governmental organizations concerned as well as to associations of lawyers.

32. As of mid-April 1992, the Governments of Australia, Austria, Bangladesh, Cuba, Iraq, Japan, Mexico, New Zealand, the Philippines, Qatar, Sweden, Sudan, Turkey, Uruguay and Yugoslavia had submitted substantive responses to the first or revised questionnaire - most with detailed information and copies of relevant legislation. The Government of Finland presented a brief account of the general policies and principles applicable in that country in regard to the right to a fair trial. The Government of Norway provided copies of legislation and referred the Special Rapporteurs to information provided in the periodic reports the Government had submitted to the Human Rights Committee. The Government of Monaco transmitted copies of the legislation relevant to the right to a fair trial. In addition, the following Governments submitted brief responses: Belarus, Bolivia, Brazil, Chad, Ireland, Japan, Myanmar, Panama and Papua New Guinea.

33. Replies were also received from the United Nations Educational, Scientific and Cultural Organization, the World Health Organization, the World Bank and the General Agreement on Tariffs and Trade. The International Committee of the Red Cross provided an explication of the judicial guarantees afforded by humanitarian law as well as two useful memoranda.

34. Amnesty International has submitted material on several countries from different regions of the world as part of a continuing commitment to assist the Special Rapporteurs by providing information on national laws and practices. The International Centre of Sociological, Penal and Penitentiary Research and Studies and the International Institute of Humanitarian Law transmitted completed questionnaires in regard to trial procedures in Italy. The International Association of Lawyers provided useful information and completed a questionnaire about trial procedures in France along with material on European interpretations of the right to a fair trial. The Belgian Section of the International Union of Magistrates responded to the questionnaire and provided legislative material on trial procedures in Belgium. A brief response was received from the International Federation Terre des Hommes. The Inter-parliamentary Union provided information about trials relating to parliamentarians. The Regional Council on Human Rights in Asia provided a detailed assessment of trial procedures in the Philippines. The Inter-Church Committee for Refugees submitted material on procedures relating to the detention of asylum seekers. The Japan Federation of Bar Associations submitted material on trial procedures in Japan. The American Bar Association communicated with the Special Rapporteurs and indicated that it would submit a response to the questionnaire. The Czech Bar Association submitted a response to the questionnaire in regard to the Czech and Slovak Federal Republic. Responses to the questionnaire were also received from the Korean Bar Association, the Dutch Association for the Judiciary and the Law Society of New South Wales. The Andean Commission of Jurists transmitted a brief response to the questionnaire for Peru. Lawasia sent an answer to the questionnaire for Indonesia.

35. All these replies and other information received will be fully taken into account by the Special Rapporteurs in their future work, particularly, in their fourth report in which they expect to analyse national practices in this field.

IV. CONCLUSIONS AND RECOMMENDATIONS

36. In resolution 1992/34 of 28 February 1992 entitled "The right to a fair trial", the Commission on Human Rights welcomed the brief report (E/CN.4/Sub.2/1990/34) and the second report (E/CN.4/Sub.2/1991/29) prepared by the two Special Rapporteurs, Mr. Stanislav Chernichenko and Mr. William Treat, and requested them to continue the preparation of their study, including the distribution of a revised questionnaire to Governments, specialized agencies, non-governmental organizations, associations of lawyers and other sources of information.

37. The two Special Rapporteurs have begun their study with a review of the fair trial standards in international instruments and in the interpretations of international bodies, such as the Human Rights Committee, the European Commisson and Court of Human Rights, and the Inter-American Commission on and Court of Human Rights. As further interpretations become available, this information will need to be updated.

38. The two Special Rapporteurs have prepared an initial questionnaire and a revised questionnaire on the right to a fair trial, which have been distributed.

39. Since a review of national practices will be a very time-consuming, difficult and complex task, the Special Rapporteurs will produce an analysis of national practices, including information received in response to the questionnaires, in their fourth report for the forty-fifth session of the Sub-Commission. The fourth report should also include an analysis of the questions posed and views expressed by the Human Rights Committee in reviewing reports by States parties to the Covenant on Civil and Political Rights.

40. In light of the material collected during this study and the views of Governments, it would be desirable to consider ways of strengthening the implementation of present fair trial standards and to improve the protection of the right to a fair trial by, for example, making non-derogable the right to a fair trial, certain aspects of that right, and/or the right to an effective remedy against arbitrary or prolonged pre-trial detention. In that regard the study would consider the elaboration of a Third Optional Protocol to the International Covenant on Civil and Political Rights which would add article 14 (the right to a fair trial provision) and article 2 (3) (the right to an effective remedy, particularly against arbitrary or prolonged pre-trial detention) to the list of provisions which cannot be the subject of derogation under article 4 of the Covenant.

41. In light of the material collected during this study and the views of Governments, it would also be appropriate to consider the desirability of elaborating upon present fair trial standards in the light of interpretations by international bodies and contemporary national practices so that basic fair trial guarantees might be incorporated into international standards, through a draft declaration, model code, model legislation or normative guidelines, for consideration by the Sub-Commission at future sessions. In this regard, the Special Rapporteurs and the Sub-Commission should endeavour to assure that the present fair trial standards are not weakened in the process of elaborating upon and delineating those standards.

42. On the basis of the material collected during this study and the views of Governments, it further appears that States should be encouraged in appropriate ways to implement existing fair trial standards in law and practice. In addition, in light of the views of Governments, it would be desirable to consider other means of strengthening the implementation of the right to a fair trial, as discussed in the first brief report.

43. The two Special Rapporteurs note that the task they have undertaken covers a vast and complex subject. The two Special Rapporteurs wish to express their appreciation for the cooperation and assistance they have received in taking the first several steps of the study.

V. SUPPLEMENTAL SELECTED BIBLIOGRAPHY

44. The first brief report (E/CN.4/Sub.2/1990/34) contained a selected bibliography; the second report (E/CN.4/Sub.2/1991/29) contained a bibliography of newly issued material. Following are further references relevant to the study:

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